



United States Department of the Interior  
FISH AND WILDLIFE SERVICE

Post Office Box 1306  
Albuquerque, New Mexico 87103



In Reply Refer To:  
FWS/R2/ES-RO/FOIA/069345  
FWS-2019-00019

Mr. Jimmy Tobias  
The Guardian, c/o MuckRock News  
411A Highland Avenue  
Somerville, Massachusetts 02144-2516

Dear Mr. Tobias:

This is a partial response to your Freedom of Information Act (FOIA) request received in the Southwest Region, U.S. Fish and Wildlife Service (Service) on October 5, 2018, in which you requested records concerning the Texas hornshell mussel. Specifically, you requested the following:

"Any and all email exchanges, including email attachments, between FWS headquarters employees Sarah Quamme and/or Caitlin Snyder and FWS Region 2 employees Shawn Sartorius and/or Susan Oetker. This request seeks communications generated between June 1, 2017 and September 1, 2017."

Your request was assigned tracking number FWS-2019-00019 and forwarded to staff in the Ecological Services Division of the Southwest Region, as well as the Branch of Listing Policy and Support, Division of Conservation and Classification in Headquarters. In response to your request, staff located 424 records, consisting of approximately 2,401 pages thus far. From these records, we have withheld, in part or full, 53 documents (consisting of approximately 420 pages) pursuant to FOIA Exemptions (b)(5) and (b)(6), as described below. Redacted and fully released records are provided to you on the enclosed disc.

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges. We are withholding 15 documents (29 pages) in part and 35 documents (388 pages) in full under the attorney-client and commercial information privileges, as described below.

Pursuant to the attorney-client privilege we have withheld 10 pages in part and 388 pages in full. The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice and is not limited to the context of litigation.

Moreover, although it fundamentally applies to confidential facts divulged by a client to his/her attorney, this privilege also encompasses any opinions given by an attorney to his/her client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect confidential client-supplied information.

The information that has been withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between Federal attorneys and agency clients related to legal matters for which the client sought professional legal assistance and services. It also encompasses opinions given by attorneys to their clients based on client-supplied facts. Additionally, the Service employees who communicated with the attorneys regarding this information were clients of the attorneys at the time the information was generated and the attorneys were acting in their capacities as lawyers at the time they communicated legal advice. Finally, the Service has held this information confidential and has not waived the attorney-client privilege.

Pursuant to the commercial information privilege of Exemption (b)(5), we have redacted 19 pages. The information withheld under this privilege consists of active conference call telephone numbers and access codes, which could be used to conduct conference calls by parties outside the government or used to call in to monitor internal government conversations. We are withholding it because disclosure to the public would chill communications between federal employees and harm the government's ability to exchange information. When the government enters the marketplace as an ordinary commercial buyer or seller, the government's information is protected under the commercial information privilege if it is sensitive information not otherwise available, and disclosure would significantly harm the government's monetary functions or commercial interests. The theory behind the privilege is that the government may be placed at a competitive disadvantage or the consummation of a contract may be endangered if confidential information generated by the government is disclosed.

Please note, some of the records we are releasing included email exchanges and or draft documents (briefing papers, information memorandums, etc.) that technically meet the requirements to be withheld under the deliberative process privilege of FOIA Exemption 5 (5 U.S.C. §552(b)(5)), i.e., predecisional and deliberative documents that are part of the decision-making process and include opinions, recommendations, and/or deliberations on legal or policy matters. However, after consulting with our legal counsel, and carefully considering the parties involved, we believe there are no institutional, commercial, and/or personal privacy interests at risk with the release of these documents. Therefore, we are releasing the records to you in full as a discretionary release. Please note, that in exercising administrative discretion, the Service does not waive its ability to invoke applicable FOIA exemptions for any arguably similar information in future requests.

We are redacting personal cell or home telephone numbers from three pages under Exemption 6. Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The phrase "similar files" covers any agency records containing information about a particular individual that can be identified as applying to that individual. To determine whether releasing records containing information about a particular individual would constitute a

clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that would be affected by disclosure against any public interest in the information. Under the FOIA, the only relevant public interest to consider under the exemption is “the extent to which the information sought would shed light on an agency’s performance of its statutory duties or otherwise let citizens know what their government is up to.” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994) (quoting *Reporters Comm. for Freedom of the Press*, 489 U.S. at 773). The burden is on the requester to establish that disclosure would serve the public interest.

When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public. The purposes for which the request for information is made do not impact this balancing test, as a release of information requested under the FOIA constitutes a release to the general public.

We have determined that the individuals to whom this information pertains have a substantial privacy interest and the disclosure of this information would shed little or no light on the performance of the agency’s statutory duties. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of these individuals, therefore we are withholding these phone numbers under Exemption 6.

This response to your request was made in consultation with Frank Lupo, Attorney-Advisor, Office of the Solicitor, and U.S. Department of the Interior. You may appeal this response to the Department’s FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal no later than 90 workdays from this letter’s date. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday. Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: “Freedom of Information Appeal.”

You must include an explanation of why you believe the Service’s response is in error. You must also include with your appeal copies of all correspondence between you and the Service concerning your FOIA request, including your original FOIA request and Service’s response. Failure to include with your appeal all correspondence between you and the Service will result in the Department’s rejecting your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer’s sole discretion) that good cause exists to accept the defective appeal. Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional appeal information or clarification. You may contact the Appeals Officer in any of the following ways:

Department of the Interior/ Office of the Solicitor  
1849 C Street, N.W., MS-6556 MIB, Washington, D.C. 20240  
Telephone: 202-208-5339, Fax: 202-208-6677  
Email: FOIA.Appeals@sol.doi.gov

Also please note, the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation and does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer. You may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road – OGIS, College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov), Web: <https://ogis.archives.gov>  
Telephone: 202-741-5770/ Fax: 202-741-5769 /Toll-free: 1-877-684-6448

You also may seek dispute resolution services from our FOIA Public Liaison, Carrie Hyde-Michaels at 703-358-2521 or via email at [carrie\\_hyde-michaels@fws.gov](mailto:carrie_hyde-michaels@fws.gov).

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

We will continue processing your request and provide a final response as soon as possible. Any fees associated with your request have been waived in accordance with 43 CFR §2.37(g). If you have any questions concerning this response please contact FOIA Coordinator Lisa Krabbe at 575-425-0033 or via email at [lisa\\_krabbe@fws.gov](mailto:lisa_krabbe@fws.gov).

Sincerely,

**MELANI**  
**E RUIZ**

Digitally signed  
by MELANIE RUIZ  
Date: 2018.11.26  
09:54:20 -07'00'

Melanie Ruiz  
Region 2 FOIA Coordinator

Enclosure (CD)